YUSHIRO CHEMICAL INDUSTRY CO LTD & ORS A

v.

JET-TECH MATERIALS SDN BHD & ORS AND ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
JEFFREY TAN JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEALS NO: W-02-1432-2010 & C
W-02-1433-2010]
7 MARCH 2012

COMPANY LAW: *Members' rights - Oppression - Oppression of minority - High Court granted petitioners relief against oppression - Appeal against order - Whether second petitioner had locus standi to file petition - Whether appellate intervention warranted - Whether acts of oppression committed to justify remedies granted - Whether petitioners became minority shareholders as a result of oppressive conduct - Companies Act 1965, s. 181* D E

Yushiro Jet-Chemicals Sdn Bhd was formed when the shareholders of Jet Chemicals Sdn Bhd, a company formed by Chen Siew Man ('the second petitioner'), sold their shares to Yushiro Chemical Industry Co Ltd ('Yushiro'), Jet-Tech Materials Sdn Bhd ('the first petitioner') and Firdaos. Jet-Tech and Firdaos were allegedly the *alter ego* of the second respondent. As a result of the company's success in Thailand, the second petitioner and Yushiro decided to set up a separate company in Thailand which was to be known as Yushiro Thailand Chemicals Pte Ltd ('YTC'). It was claimed that the company would have controlling interest in the operations in Thailand and Yushiro had promised that it would not directly take up shares in YTC. Subsequently, Yushiro acquired an additional 500,000 shares in the company and became the owner of 51% of the share capital of the company, while the balance of the 49% of the shares in the company was held by the nominees of the second petitioner. Later, it transpired that based on the actual amount agreed to be invested by the company in YTC, the company's actual percentage of shareholding in YTC became only 16%. The petitioners claimed that Yushiro had caused the petitioners to reduce their 73.5% shareholding in the F G H I

company to 49% through their false representation that the company would be taking the lead in the venture in Thailand. The petitioners further claimed that the reduction of the company's shareholding in YTC to 16% would adversely affect the profits of the company. The petitioners thus filed a petition under s. 181 of the Companies Act 1965 ('the Act'), wherein they claimed that the powers of the directors were being exercised in a manner which was oppressive to the petitioners or in disregard of their interest as members and shareholders. The petitioners prayed, *inter alia*, (i) that Yushiro buy the shares of the first petitioner in the company; (ii) that Yushiro compensate the petitioners for their loss of controlling the interest in the company or alternatively that the allotment of 500,000 shares, which resulted in Yushiro holding 51% of the paid-up capital of the company be declared void; and (iii) that Yushiro be restrained from removing the second petitioner as a director to the company. The High Court ordered that Yushiro purchase 735,000 ordinary shares in the company from the first petitioner at a price of RM8,200,165, as assessed by the qualified actuary in this case. Yushiro was also ordered to pay the first petitioner a sum of RM3,610,698 as compensation for loss of controlling interest in the company. These were the appeals by Yushiro and the other shareholders against that decision. The appellants also raised the preliminary issue as to whether the second petitioner had the *locus standi* to file a petition under s. 181 of the Act.

Held (allowing the appeals with costs)
Per Zaharah Ibrahim JCA delivering the judgment of the court:

(1) The second petitioner was neither a member nor a debenture holder of the company. He had also not shown that his position was such that an exception ought to be made in his case. A person, who claimed beneficial interest in the shares of the company through a registered member, did not have the *locus standi* to present a petition under s. 181 of the Act. As the second respondent had chosen to hold shares in the company through the first petitioner, he had to seek his reliefs, if any, under s. 181 of the Act *via* the first petitioner. (paras 34-39)

(2) The court had the necessary power to grant the reliefs prayed for if the grounds set out in paras. (a) and (b) under s. 181(1) of the Act had been established. However, when there was

no wrong, there cannot be a remedy. The trial court had made a finding that acts of oppression had taken place without giving any grounds for such finding. As such, appellate intervention was clearly warranted. (paras 40-44)

(3) The decision to allow Yushiro to take up 500,000 additional shares in the company, thus making it the majority (51%) shareholder, was made by a resolution approved by all the shareholders of the company, including the petitioners. Therefore, the act of issuing and allotting the additional 500,000 shares to Yushiro did not constitute an oppressive act under s. 181 of the Act, and the trial judge erred when he found that 'the petitioners became minority shareholders as a result of the oppressive conduct'. (paras 47-52)

(4) Although the petitioners claimed that they were made to believe that the company would be taking the lead in the operation to be undertaken in Thailand through YTC, the minutes of the meeting held on 13 April 2004 showed that the shareholders had agreed that the company would only participate in 30% of the shareholding in Jet Thai, while Yushiro would take up 50% of the shareholding in Jet Thai. Clearly, any contention that the company would take the lead in the Thai venture no longer had any merit. (paras 54-56)

(5) The decision to invest only 20 million Baht, which later translated into 16% of the share capital in YTC, was clearly a management/investment decision. The second petitioner, and by extension the first petitioner, had known of this and did not express any opposition to this decision. (paras 57-60)

(6) At the point when the petition was presented, the second petitioner was still on the Board of Directors of the company. Further, Gan and Firdaos, the second petitioner's nominees, tasked with protecting the interest of the first petitioner were still on that Board. Clearly the interest of the first petitioner was still well represented on the Board of Directors of the company and it could not claim that it had been excluded from the management of the company. In the circumstances, there was no evidence that there had been a deprivation or denial of the legitimate expectation of the rightful petitioner, namely the first petitioner, to participate in the management of the company. (paras 66-69)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Yushiro Jet-Chemicals Sdn Bhd telah ditubuhkan apabila pemegang-pemegang saham Jet Chemicals Sdn Bhd, sebuah syarikat yang telah ditubuhkan oleh Chen Siew Man ('pempetisyen
B kedua'), telah menjual saham mereka kepada Yushiro Chemical Industry Co Ltd ('Yushiro'), Jet-Tech Materials Sdn Bhd ('pempetisyen pertama') dan Firdaos. Jet-Tech dan Firdaos kononnya merupakan *alter ego* responden kedua. Akibat daripada kejayaan syarikat di Thailand, pempetisyen kedua dan Yushiro telah
C bercadang untuk menubuhkan sebuah syarikat berasingan di Thailand yang dikenali sebagai Yushiro Thailand Chemicals Pte Ltd ('YTC'). Ia dituntut bahawa syarikat mempunyai kepentingan untuk mengawal operasi di Thailand dan Yushiro telah berjanji bahawa ia tidak akan mengambil saham secara terus di YTC.
D Yushiro kemudiannya telah memperolehi 500,000 saham dalam syarikat dan telah menjadi pemilik 51% saham berbayar syarikat, manakala baki 49% saham dalam syarikat telah dipegang oleh penama-penama pempetisyen kedua. Kemudiannya, ia didapati bahawa berdasarkan jumlah sebenar yang dipersetujui untuk
E dilabur oleh syarikat dalam YTC, peratus sebenar pegangan saham syarikat di YTC adalah hanya 16%. Pempetisyen-pempetisyen menuntut bahawa Yushiro telah menyebabkan pempetisyen-pempetisyen untuk mengurangkan pegangan saham mereka sebanyak 73.5% dalam syarikat kepada 49% melalui representasi
F salah mereka bahawa syarikat akan mengetuai usaha di Thailand. Pihak pempetisyen menuntut lagi bahawa pengurangan pegangan saham di YTC kepada 16% akan mempunyai kesan bertentangan terhadap keuntungan syarikat. Oleh itu, pempetisyen-pempetisyen telah memfailkan satu petisyen di bawah s. 181 Akta Syarikat
G 1965 ('Akta') di mana mereka telah menuntut bahawa kuasa pengarah-pengarah telah dilaksanakan secara menindas terhadap pempetisyen-pempetisyen atau tidak menghiraukan kepentingan mereka sebagai ahli-ahli pemegang saham. Pempetisyen-pempetisyen menuntut, antara lain, (i) bahawa Yushiro membeli
H saham-saham itu daripada pempetisyen pertama dalam syarikat; (ii) bahawa Yushiro memberi pampasan kepada pempetisyen-pempetisyen atas kerugian mereka dalam mengawal kepentingan di dalam syarikat atau pun secara alternatif, bahawa pengagihan 500,000 saham yang menyebabkan pegangan sebanyak 51% dalam
I Yushiro bagi modal berbayar syarikat digelar sebagai terbatal; dan (iii) bahawa Yushiro dihalang daripada memecat pempetisyen kedua sebagai pengarah syarikat. Mahkamah Tinggi telah memerintahkan

bahawa Yushiro membeli 735,000 saham biasa dalam syarikat daripada pempetisyen pertama pada harga RM8,200,165, seperti ditaksir oleh jurukira bertauliah dalam kes ini. Yushiro just diperintah untuk membayar jumlah sebanyak RM3,610,698 kepada pempetisyen pertama sebagai pampasan bagi ganti rugi untuk mengawal kepentingan syarikat. Ini adalah rayuan-rayuan oleh Yushiro dan pemegang-pemegang saham yang lain terhadap keputusan tersebut. Perayu-perayu juga membangkitkan isu awalan berkenaan sama ada pempetisyen kedua mempunyai *locus standi* untuk memfailkan petisyen di bawah s. 181 Akta.

Diputuskan (membenarkan rayuan degan kos)
Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:

(1) Pempetisyen kedua bukanlah seorang ahli ataupun pemegang debentur syarikat. Beliau juga tidak menunjukkan bahawa pangkatnya adalah sebegitu di mana pengecualian boleh dibuat di dalam kesnya. Seseorang yang menuntut kepentingan benefisial di dalam saham-saham syarikat melalui ahli berdaftar tidak mempunyai *locus standi* untuk mengemukakan petisyen di bawah s. 181 Akta. Memandangkan responden kedua telah memilih untuk memegang saham di dalam syarikat melalui pempetisyen pertama, responden kedua perlu mendapat relifnya, jika ada, di bawah s. 181 Akta melalui pempetisyen pertama.

(2) Mahkamah mempunyai kuasa tertentu untuk membenarkan relif-relif yang dituntut jika alasan di perenggan-perenggan (a) dan (b) di bawah s. 181(1) Akta telah dibuktikan. Walau bagaimanapun, bila tiada kekhilafan, tidak mungkin adanya remedi. Mahkamah perbicaraan telah membuat dapatan bahawa tindakan menindas telah berlaku tanpa memberi sebarang alasan untuk dapatan sebegitu. Oleh itu, campur tangan rayuan adalah wajar.

(3) Keputusan untuk membenarkan Yushiro mengambil 500,000 saham tambahan di dalam syarikat, dengan itu membuatnya pemegang saham majoriti (51%), telah dibuat melalui resolusi yang disahkan oleh pemegang-pemegang saham syarikat, termasuk pihak pempetisyen. Oleh itu, tindakan mengeluarkan dan mengagihkan 500,000 saham tambahan kepada Yushiro tidak berjumlah kepada suatu tindakan menindas di bawah

A s. 181 Akta dan hakim perbicaraan telah khilaf apabila beliau mendapati bahawa pempetisyen-pempetisyen telah menjadi minoriti akibat daripada kelakuan menindas.

(4) Walaupun pempetisyen-pempetisyen menuntut bahawa mereka
B telah dibuat untuk mempercayai bahawa syarikat akan mengetuai operasi yang dijalankan di Thailand melalui YTC, minit mesyuarat yang diadakan pada 13 April 2004 menunjukkan bahawa pemegang-pemegang saham telah bersetuju bahawa syarikat hanya akan mengambil bahagian
C dalam 30% pegangan saham dalam Jet Thai, manakala Yushiro akan mengambil 50% saham-saham dalam Jet Thai. Jelasnya, apa-apa hujahan bahawa syarikat akan mengetuai kawalan operasi Thai tidak mempunyai merit.

(5) Keputusan untuk melabur hanya 20 juta Baht, yang
D kemudiannya ditafsir kepada 16% saham berbayar YTC jelas menunjukkan suatu keputusan pengurusan/pelaburan. Pempetisyen kedua, dan dilanjutkan kepada pempetisyen pertama, telah mempunyai pengetahuan mengenai ini tetapi
E tidak mengemukakan sebarang bantahan terhadap keputusan ini.

(6) Apabila petisyen dikemukakan, pempetisyen kedua masih lagi dalam lembaga pengarah syarikat. Tambahan, Gan dan Firdaos, penama-penama pempetisyen kedua, yang dilantik untuk
F menjaga kepentingan pempetisyen pertama masih di lembaga tersebut. Jelas, kepentingan pempetisyen pertama masih diwakil dengan baik atas lembaga pengarah syarikat dan ia tidak boleh menuntut bahawa ia telah dikecualikan daripada pengurusan syarikat. Dalam keadaan sebegini, tiada keterangan bahawa
G terdapatnya penafian harapan sah pempetisyen yang berhak, iaitu pempetisyen pertama, untuk bertindak dalam pengurusan syarikat.

Case(s) referred to:

H *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd &; Ors And Other Application [1994] 1 LNS 279 HC* ***(dist)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(dist)***

Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(foll)***

I **Legislation referred to:**

Companies Act 1965, ss. 16(6), 152A, 181(1), (2)

(Civil Appeal No: W-02-1432-2010)
For the appellants - Dhinesh Bhaskaran (Sheila Lingam with him); M/s Shearn Delamore
For the 1st & 2nd respondents - A Kanesalingam (V Jeyakumar with him); M/s Kanesalingam & Co
For the 3rd & 4th respondents - Azhar Harun (Abdullah Abd Rahman with him); M/s Cheang & Ariff

(Civil Appeal No: W-02-1433-2010)
For the appellants - Azhar Harun (Abdullah Abd Rahman with him); M/s Cheang & Ariff
For the respondents - A Kanesalingam (V Jeyakumar with him); M/s Kanesalingam & Co

[Editor's note: For the High Court judgment, please see Yushiro Chemical Industry Co Ltd & Ors v. Jet-Tech Materials Sdn Bhd & Ors & Another Case [2012] 1 LNS 977.]

Reported by Vani Krishnan

JUDGMENT

Zaharah Ibrahim JCA:

Introduction

[1] For ease of reference, the parties in these appeals will be referred to, in these grounds, in the following manner:

Name	Capacity before Court of Appeal	Capacity before High Court	Mode of reference in these Grounds
Jet-Tech Materials Sdn Bhd	1st Respondent in both appeals	1st Petitioner	Jet-Tech
Chen Siew Man	2nd Respondent in both appeals	2nd Petitioner	Chen
Yushiro Chemical Industry Co. Ltd	1st Appellant in Appeal No. W-02-1432-2010	1st Respondent	Yushiro

Name	Capacity before Court of Appeal	Capacity before High Court	Mode of reference in these Grounds
Ota Aisaku	2nd Appellant in Appeal No. W-02-1432-2010	4th Respondent	Ota
Sakurai Hiroki	3rd Appellant in Appeal No. W-02-1432-2010	5th Respondent	Sakurai
Gan Lai Ban	1st Appellant in Appeal No. W-02-1433-2010 and 3rd Respondent in Appeal No W-02-1432-2010	2nd Respondent	Gan
Firdaos bin Azhar	2nd Appellant in Appeal No. W-02-1433-2010 and 4th Respondent in Appeal No W-02-1432-2010	3rd Respondent	Firdaos

Background Facts

[2] These appeals revolve around a dispute between the shareholders of a company known as Yushiro-Jet Chemicals Sdn Bhd (after this referred to as "the company").

Formation Of The Company

[3] The company was formed by Chen on 27 December 1990 with the name of Jet Chemicals Sdn Bhd. Prior to the involvement of Yushiro, the shareholders of the company were Chen (515,000 shares), Gan (250,000 shares) and Soo Yoke Yew (235,000 shares).

[4] On 29 August 1996, the shareholders of the company entered into a shareholders' agreement with Yushiro, Jet-Tech and Firdaos. By that agreement, the original shareholders of the company agreed to sell their shares to Yushiro, Jet-Tech and Firdaos. Jet-Tech was said to be the alter ego of Chen.

[5] Concurrently, a licence and technical assistance agreement was entered into by the company with Yushiro.

[6] The objective of the two agreements was the participation of the parties in a project to manufacture and sell, *inter alia*, metal working oil and fluid, lubricants and cleaners. Yushiro had the necessary technical data, experience and information for the project to be undertaken.

[7] As a result of the parties entering into that shareholders' agreement of 29 August 1996, the shareholding of the company became as follows:

Shareholder	Number of shares	Percentage
Jet-Tech	435,000	43.5%
Firdaos	300,000	30%
Yushiro	265,000	26.5%
Total	1,000,000	100 %

[8] The 1 million shares constituted the then issued and paid up share capital of the company. Its authorised capital was in fact 2 million shares of RM1 each.

[9] The company subsequently set up a manufacturing plant in Malaysia and apparently performed well. The company's products manufactured in Malaysia were marketed in Thailand, Singapore, the Philippines, Indonesia, Vietnam and India, according to the petition.

[10] Sometime in the year 2000, according to the petitioners, Yushiro requested the company to promote sales of the company's products in the above-mentioned countries.

[11] The company therefore took the steps of establishing a representative office in Thailand and assisted a company by the name of Miyathai, which the petitioners say was the agent of Yushiro, to "revive the sales of the product in Thailand". The company spent RM1.6 million in doing so.

A *The Establishment Of Jet Thai*

[12] According to Chen, as a result of the company's success in its efforts in Thailand, he and Yushiro considered it "feasible to set up a separate company in Thailand to be known at first as
B Jet Thai and later as Yushiro Thailand Chemicals Pte Ltd (YTC)". (This company will be referred to as "Jet Thai" in these grounds). This marked the beginning of the dispute that led to these appeals.

[13] According to Chen, Yushiro promised him that the company
C would take the lead in the manufacturing and sales activities in Thailand, with Miyathai and the (Thai) local shareholders as minor partners. It was understood that what was meant by this was that the company would have the controlling interest in the operations in Thailand, and later in Indonesia, Vietnam and the region as a
D whole. The petitioners also claimed that Yushiro promised that it would not directly take up shares in Jet Thai.

[14] Subsequently, Yushiro acquired a further 500,000 shares in the company at the then book value of RM5 per share. The
E shares came from the balance of 1 million unissued shares.

[15] Yushiro thus became the owner of 51% of the share capital of the company. The balance of 49% was with Chen, held not directly but through his *alter ego*/nominees.

F **[16]** Yushiro was then permitted to appoint one additional member to the Board of Directors of the company. The person appointed was Sakurai, who was appointed on 8 October 2003.

[17] Already on the board of directors of the company at the
G material time was the Chen, Firdaos, Gan and Ota. Ota was Yushiro's sole nominee on the board before Sakurai's appointment. Gan was appointed on 1 July 2003, about three months before Sakurai.

H *The Dispute*

[18] The petitioners claimed that shortly after Yushiro acquired its 51% interest in the company, Yushiro "suggested that the company would only take 40% shares" in Jet Thai and Yushiro
I would itself take up 30% shares, with Miyathai taking up 25% and the balance of 5% to be taken up by (Thai) local shareholders.

[19] Later, at a meeting of the Board of Directors of the company on 13 April 2004, it was proposed that instead of the 40% proposed earlier, the company would take up only 30% of the investment in Jet Thai.

[20] Later that year, it transpired that based on the actual amount agreed to be invested by the company in Jet Thai, the company's actual percentage of shareholding became only 16%. Further investment would be required to bring the percentage of shareholding to 30%.

[21] Chen had, subsequent to the developments with regard to the shareholding of the company in Jet Thai, moved to remove Gan and Firdaos from the board of the company. This met with resistance from Yushiro. The President of Yushiro, Takatsugu Yoshida ("Takatsugu"), sent Chen a letter dated 29 November 2004 to inform Chen that Yushiro would not agree to the removal of Gan and Firdaos from the Board of Directors of the company. This was followed by another letter dated 2 December 2004 in which Takatsugu reiterated Yushiro's position with regard to the two gentlemen, and requested Chen's retirement from the company.

[22] The petitioners presented a petition seeking relief under s. 181 of the Companies Act 1965 ('CA') on 21 December 2004. The petition was subsequently amended and it was the then decision of the High Court on the Amended Petition (encl. 90) that became the subject matter of the appeal before us.

The Grounds Of The Petition

[23] The petitioners claimed that Yushiro had caused the petitioners to reduce their 73.5% shareholding in the company to 49% through their false representation that the company would be taking the lead in the venture in Thailand.

[24] The petitioners also claimed that the reduction of the company's shareholding in Jet Thai to 16% would adversely affect the profits of the company.

[25] The petitioners therefore claimed that the powers of the directors were being exercised in a manner oppressive to the petitioners or in disregard of their interest as members and shareholders.

[26] The petitioners also claimed that they were being excluded from the management of the company.

[27] The petitioners therefore prayed for relief under s. 181 of the Companies Act 1965.

Relief Claimed

[28] The petitioners prayed, *inter alia*, for orders:

(a) requiring Yushiro to buy the shares of Jet-Tech in the company "at the fair value on a willing seller willing buyer basis on the date of filing this petition";

(b) requiring Yushiro to compensate the petitioners for their loss of controlling interest in the company, or alternatively, that the allotment of 500,000 shares to Yushiro resulting in Yushiro holding 51% of the company's paid up capital be declared void;

(c) requiring Gan and Firdaos to deliver the share certificates for 200,000 and 100,000 shares respectively in the company to the petitioners;

(d) restraining the respondents from disbursing money to Thailand without Chen's written agreement;

(e) restraining Yushiro from removing Chen as a director of the company and from designating more than one director to the company's Board of Directors.

Relief Granted

[29] The High Court ordered Yushiro to purchase 735,000 ordinary shares in the company from Jet Tech at a price of RM8,200,165 as assessed by the qualified actuary in this case, with payment to be effected by the parties within 60 days from the date of the judgement. For this purpose, Gan and Firdaos were ordered to deliver to Jet-Tech share certificates in their respective name in respect of shares in the company.

[30] Yushiro was also ordered to pay Jet-Tech a sum of RM3,610,698 as compensation for loss of controlling interest in the company by the allotment of 500,000 shares in the company to Yushiro.

[31] Interest at 8% per annum was ordered to be paid on the two sums until final settlement.

The Law

[32] Section 181 of the Companies Act 1965 reads as follows:

Remedy in cases of an oppression.

181 (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may:

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

A (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

B (3) Where an order that the company be wound up is made pursuant to paragraph (2)(e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

C

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to

D make any further alteration in or addition to the memorandum or articles inconsistent with the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the

E company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order.

F Penalty: One thousand ringgit. Default penalty.

Preliminary Issue: *Locus Standi*

[33] Before dealing with issues of oppression which would entitle a petitioner to the reliefs provided for in s. 181 of the CA, there

G is the preliminary matter of the *locus standi* of Chen, the 2nd petitioner, to bring the petition.

[34] The learned High Court Judge in para. 24 of his judgement held that Chen had the necessary *locus standi* by virtue of his

H shareholding in Jet Tech.

[35] It is manifestly clear that the remedy in s. 181 of the CA is given only to a member, a debenture holder and the Minister. By virtue of s. 16(6) of the CA, a member is someone whose name

I appears in the register of the relevant company.

[36] The Federal Court in *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113 held that even if a person's name is not on the company's register of members, he is still, nonetheless, able to pursue a remedy under s. 181 of the CA if he falls within such exceptions as would make it unjust for him to be prevented from pursuing a remedy under s. 181 of the CA.

[37] There is no dispute that Chen, the second petitioner, is neither a member nor a debenture holder of the company. Chen has also not shown that his position is such that an exception ought to be made in his case.

[38] In our view, a person who claims beneficial interest in the shares of a company through a registered member, does not have the *locus standi* to present a petition under s. 181 of the CA. We find support for this view from the decision of the Federal Court in *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 1 LNS 130; [1979] 2 MLJ 240.

[39] Chen had chosen to hold shares in the company through the 1st petitioner, Jet-Tech. It is *via* Jet-Tech that Chen must seek his reliefs, if any, under s. 181 of the CA.

Acts Of Oppression

[40] We have carefully perused the grounds of judgement of the learned High Court Judge to ascertain the basis for the orders made in this case. Unfortunately, we are unable to find any. The learned High Court Judge had devoted almost the whole of his grounds of judgement to issues of valuation for the purpose of determining the price at which Yushiro was to purchase the shares of Jet-Tech in the company, and for the purpose of arriving at the amount of compensation to be paid by Yushiro for Jet-Tech's loss of majority control of the company.

[41] We are mindful of the limits of the powers of an appellate court to interfere with a finding of fact by a trial court. However, in this case, where the trial court had made a finding that acts of oppression had taken place but had failed to give its grounds for such finding, appellate intervention is certainly warranted.

[42] Section 181(2) of the CA is very clear. It is only upon either of the grounds set out in paras. (a) and (b) in s. 181(1) being found by the court to have been established that the court has the power to make the orders necessary "with the view to bringing to an end or remedying the matters complained of".

[43] It is not open to the High Court to make the orders if neither of the grounds is found to have been established. Where there is no wrong, there cannot be a remedy.

[44] We must therefore determine whether, on the facts of this case, acts of oppression had been committed to justify the exercise by the learned High Court Judge of the powers under s. 181(2) of the CA.

[45] In view of the reliefs granted by the High Court, we shall, in these grounds, only deal with the alleged acts of oppression which relate to those reliefs.

Decision Resulting In Yushiro Becoming Majority Shareholder

[46] The first ground was the alleged act of oppression by Yushiro in purportedly misrepresenting to the petitioners that the company would take the lead in the Thai venture.

[47] What must never be lost sight of is that Yushiro took up the additional 500,000 shares from the unissued shares of the company with the blessings of the shareholders. The circular resolution was circulated by the then Board of Directors which included Chen as well as his nominee, Firdaos. Yushiro at that point in time only held 26.5% of the issued share capital of the company and was in fact the minority shareholder. Yushiro at that point in time had only one representative on the Board of Directors of the company.

[48] By written resolution of the members of the company in lieu of an extraordinary general meeting (under s. 152A of the CA), the members of the company voted unanimously to allow the company to increase its issued and paid up capital by issuing 500,000 new ordinary shares of RM1 each at RM5 per share and allot them to Yushiro. Chen (as the authorised representative of Jet-Tech), Firdaos and Gan Lai Ban who, according to Chen, were Chen's nominees and held their registered shares in trust for Chen, voted in favour of the resolution.

[49] How then could that act of issuing and allotting the additional 500,000 shares to Yushiro constitute an oppressive act under s. 181(1) of the CA? A

[50] The Federal Court in *Owen Sim Liang Khui*'s case accepted as correct the statement of law by Anuar J in *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd &; Ors And Other Application* [1994] 1 LNS 279; [1994] 2 MLJ 789 that the remedy in s. 181 of the CA is only available to majority shareholders if they are not or are unable to control the board of the company. B

[51] This was not the case here. On the facts of the case in the appeal before us, the decision to allow Yushiro to take up 500,000 additional shares in the company, thus making it the majority (51%) shareholder, was made by a resolution approved by all the shareholders including the petitioners. When one holds almost 3/4 of the shares of a company, and controls the board of directors of the company, it would be preposterous to even suggest that one can be forced to agree to such a resolution. C D

[52] We are therefore of the view that the learned High Court Judge erred when he stated, in para. 23 of his grounds of judgement, that "the petitioners became minority shareholders as a result of the oppressive conduct". E

Decision On Level Of Participation In Jet Thai

[53] This was in fact the pivotal issue in this case. F

[54] The petitioners claimed that they were made to believe that the company would be taking the lead in the operation to be undertaken in Thailand through Jet Thai, but Yushiro had instead taken the lead and the company's level of participation was reduced to 16%. G

[55] However, Chen himself admitted in para. 14(i) of the petition that he attended a meeting of the Board of Directors of the company on 13 April 2004 and finally signed the minutes of the meeting which agreed that the company would only participate in 30% of the shareholding in Jet Thai, while Yushiro would take up 50% of the shareholding in Jet Thai. Clearly by this time any contention that the company would take the lead in the Thai venture no longer had any merit. H I

[56] Chen stated that he was forced to sign the minutes as the other directors had approved the minutes. We find this difficult to accept. There was no evidence of any force as alleged being exerted.

[57] How did the company end up with only 16% of the shares in Jet Thai?

[58] The minutes of that very same meeting held on 13 April 2004 stated that the estimated cost of investment of the company in Jet Thai would be approximately USD450,000. From the affidavit in reply by Gan as deposed on 6 January 2005, it appears that that amount translated into 20 million baht. This would amount to only 16% of the share capital in Jet Thai.

[59] That the amount of 20 million baht would only enable the company to acquire 16% of the interest in Jet Thai was clearly within Chen's knowledge. The minutes of the meeting of the Board of Directors held on 22 October 2004 disclosed that Chen at that meeting proposed that the company "invest an amount equivalent to 20% of the share capital" of Jet Thai to be funded "by a share capital increase of 100,000 shares in the company solely from himself". The board rejected that proposal. Gan explained the reason in his affidavit in reply. According to him the board believed that it was not prudent to invest more than 20 million baht in Jet Thai taking into consideration the company's financial status and the feasibility of the operations of Jet Thai.

[60] This decision to invest only 20 million baht (which initially translated into 30% but later 16% of the share capital of Jet Thai) in Jet Thai was clearly a management/investment decision. Chen (and by extension Jet-Tech) knew of this and participated in the discussions and did not in fact express any opposition to it.

[61] We are therefore unable to fathom how this decision could be construed as an act of oppression within the meaning of s. 181(1) of the CA.

Exclusion From Management Of The Company

[62] The petitioners claimed that they had been excluded from the management of the company when Chen was asked to retire from the Board of Directors of the company.

[63] The affidavits and the exhibits showed that Chen, who was then the Managing Director of the company, had proposed to dismiss Gan and Firdaos from the Board of Directors of the company. This did not find favour with Takatsugu, the President of Yushiro, who reminded Chen (in his letter dated 29 November 2004) of their meeting on 20 August 2004, at which meeting Chen had agreed to leave the management of the company to Gan and Firdaos.

[64] When Chen appeared to be adamant that Gan and Firdaos would be dismissed, Takatsugu wrote a further letter dated 2 December 2004, again reminding Chen of their meeting on 20 August 2004 and that the power to dismiss a director belonged to the shareholders' meeting, not the Managing Director. In that same letter Takatsugu made a request in the following words:

> I would like to request you to take voluntary retirement from YJC management and would like you to support YJC as one of shareholders. Please would you understand I may be compelled to judge to take some legal action as the major shareholder if you will not follow my request.

[65] On 21 December 2004, the petitioners presented this petition.

[66] It is clear to us that at the point when the petition was presented, Chen still remained on the Board of Directors of the company.

[67] It is also quite clear to us that Gan and Firdaos whom Chen claimed to be nominees of his (and therefore tasked with protecting the interest of Jet-Tech, his alter ego, on the Board of Directors of the company) were still on that board.

[68] Clearly therefore the interest of Jet-Tech was still well represented on the Board of Directors of the company. It could not therefore be said that Jet-Tech, the member (as opposed to Chen, who was not) had been excluded from the management of the company, even if Chen was no longer on the board of the company.

[69] In the circumstances, we are not able to agree with the contention that there had been a deprivation or denial of the legitimate expectation of the rightful petitioner here (namely Jet-Tech) in the Ebrahimi sense, or in any other sense, to participate in the management of the company.

Conclusion

[70] Having examined the evidence presented before the High Court, we are unable to find any basis that would be able to support the learned High Court Judge's bare finding that acts of oppression had been established.

Decision

[71] In the circumstances, we are unanimous in our decision that both appeals be allowed with costs. The amount of RM135,000 is ordered to be paid to the appellants in Appeal No. W-02-1432-2010, and the amount of RM65,000 is ordered to be paid to the appellants in Appeal No. W-02-1433-2010 as fixed costs for the appeals before us as well as in respect of the proceedings in the court below.